86-942

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

RHODE ISLAND PUBLIC UTILITIES COMMISSION,
NEW JERSEY BOARD OF PUBLIC UTILITIES,
Cross-Petitioners,

v.

METROPOLITAN TRANSPORTATION AUTHORITY,
Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals err in determining that States or state governmental entities which fall within the plain meaning of the term "public bodies" are precluded from obtaining Niagara project power for the benefit of State consumers of electricity?

STATEMENT PURSUANT TO SUPREME COURT RULE 21.1

The following parties may have an interest in the outcome of this proceeding:

Federal Energy Regulatory Commission
Power Authority of the State of New York
Connecticut Municipal Electric Energy Cooperative
Allegheny Electric Cooperative, Inc.
Boston Edison Company
Eastern Edison Company
Fitchburg Gas and Electric Light Company
Massachusetts Electric Company
Metropolitan Transit Authority
Municipal Electric Utilities Association of New York State
Vermont Department of Public Service
Public Service Electric and Gas Company
Massachusetts Municipal Wholesale Electric Company
City of Cleveland, Ohio
Bethlehem Steel Corporation
Borough of Lansdale
Sussex Rural Electric Cooperative
Rockland Electric Company
New Jersey Preference Boroughs
General Motors Corporation
Occidental Chemical Corporation
Olin Corporation
Union Carbide Corporation

Attorneys for the above parties and the Solicitor General have been served with copies of this petition.

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Cross-Petitioners,

v.

METROPOLITAN TRANSPORTATION AUTHORITY,
Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

This cross-petition is filed pursuant to Rule 19.5 of the Rules of the Supreme Court of the United States, in response to a Petition for a Writ of Certiorari filed by the Metropolitan Transportation Authority ("MTA") (*Metropolitan Transportation Authority v. Federal Energy Regulatory Commission*, Docket No. 86-736, filed November 3, 1986). Cross-petitioners seek review by this Court of an opinion and judgment of the United States Court of Appeals for the Second Circuit filed June 17, 1986. *MTA v. FERC*, 796 F.2d 584 (2d Cir. 1986) (A1-A20).[1]

[1]References to "A " are to the Appendix filed by the Metropolitan Transportation Authority with its Petition for a Writ of Certiorari, U.S. Supreme Court Docket No. 86-736. Cross-Petitioners' own Appendix, referenced infra in Section II B, is referenced as "RINJA ".

A petition for rehearing and suggestion for rehearing *en banc* was denied by that court on August 6, 1986 (A21-22).

The opinion affirmed two decisions of respondent Federal Energy Regulatory Commission ("FERC"), *Opinion No. 229; Declaratory Opinion and Order Affirming With Modifications Initial Decision on Niagara Preference Power for States Neighboring New York*, 30 FERC (CCH) ¶61,323 (March 27, 1985) (A49-A85) ("Opinion No. 229"), and *Opinion No. 229-A; Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time*, 32 FERC (CCH) ¶61,194 (July 30, 1985) (A23-48) ("Opinion No. 229-A"), which had affirmed, with modifications, *Initial Decision of the Administrative Law Judge*, 22 FERC (CCH) ¶63,087 (March 9, 1983) (A86-A140).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 17, 1986. The Court of Appeals denied a petition for rehearing by order filed August 6, 1986. Cross-petitioner Rhode Island Public Utilities Commission received on November 6, 1986, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit of petitioner Metropolitan Transportation Authority, docketed as No. 86-736. Jurisdiction of this Court is invoked under 28 USC § 1254(1) and Rule 19.5 of the Rules of the Supreme Court of the United States.

STATUTORY PROVISION INVOLVED

The statutory provision whose interpretation is at issue is Section 1(b)(1) of the Niagara Redevelopment Act of 1957, 16 USC § 836(b)(1), which provides in relevant part:

> In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance . . .

———o———

STATEMENT OF THE CASE

Congress passed the Niagara Redevelopment Act, 16 USC § 836, (the "NRA") in 1957 to establish a license for the Power Authority of the State of New York ("PASNY") to finance, construct and operate a hydroelectric power project that would "utilize all of the United States share of the water of the Niagara River". 16 USC § 836(a). Under the terms of the NRA, a 50 percent "preference and priority to public bodies and nonprofit cooperatives within economic transmission distance" was also established. 16 USC § 836(b)(1). Of this 50 percent preference, PASNY was required to distribute a "reasonable portion" of the project power to the appropriate agencies in neighboring states. 16 USC § 836(b)(2). The

NRA gave a pivotal role to the States, inviting them to establish bargaining agencies for the procurement of PASNY power. 16 USC § 836(b)(2).

Rhode Island General Laws of 1956, as amended, Section 39-1-3, vests in the Rhode Island Public Utilities Commission, ". . . jurisdiction, powers, and duties to hold investigations and hearings involving the rates, tariffs, tolls and charges and the sufficiency and reasonableness of facilities and accommodations of railroad, gas, electric, water, telephone, telegraph and pipeline public utilities . . . ." Additionally, in 1980 the Rhode Island Legislature passed R.I.G.L. § 39-1-39, which established the Public Utilities Commission as the State's bargaining agent for out-of-state purchases of power:

> *Purchase of power.*—(a) Upon the consent and approval of the governor the commission shall be designated as the agency of the state to negotiate, bargain with and otherwise arrange with any out-of-state electrical energy producer in the public or private sector for the procurement of power capacity and power output from said electrical energy producer with the exclusive right on behalf of the state to contract for the purchase of such power from any producer outside of the state, including the Dominion of Canada and/or any of its provinces and any other state in the United States.
>
> (b) Upon the consent and approval of the governor the commission shall act as the agent for the state for the resale of any power purchased from any public or private out-of-state producer to any Rhode Island electric energy producer whether publicly or privately owned. Such resale by the commission to a Rhode Island electric energy producer shall be made on a non-profit basis without preference or discrimination for distribution within the State.

> (c) The commission, with the consent of the Governor, is authorized and empowered to enter into contracts for the transmission of such power from the place of purchase to a point or points within the state.

Rhode Island thereby sought to take advantage of the NRA's express provision for State public agencies to assume the exclusive role of bargaining agent for their State in the allocation and purchase of PASNY power.

Pursuant to *N.J.S.A.* 48:2-1 *et seq.* and *N.J.S.A.* 52:27F-6, the New Jersey Board of Public Utilities is an administrative agency in the Department of Energy, a principal department established in the Executive branch of the Government of the State of New Jersey. Established by Chapter 195 of the Public Laws of 1911, as subsequently amended by Titles 48 and 52 of the New Jersey Statutes, the New Jersey Board of Public Utilities, amongst other duties and responsibilities, regulates all investor-owned electric utility companies in the State of New Jersey, which companies serve approximately 98% of the residential units of the State of New Jersey.

On November 17, 1981 Brendan T. Byrne, the then Governor of the State of New Jersey, issued Executive Order No. 112, which designated the New Jersey Board of Public Utilities as the bargaining agent for the State of New Jersey for participation in PASNY's 1985 Neighboring State Hydroelectric Allocation Plan Proceeding. Pursuant thereto, on May 14, 1982, the New Jersey Board of Public Utilities submitted an application to PASNY to receive an allocation of its low cost hydroelectric power. Subsequently, on October 12, 1982, Thomas Kean, Governor of the State of New Jersey, issued Executive Order No.

112, ordered the New Jersey Board of Public Utilities to be the designated bargaining agent for the State in the proceedings before PASNY, and authorized the New Jersey Board of Public Utilities to allocate all power received from PASNY to all residential electric consumers in the State, whether they be serviced by investor-owned, cooperative or municipally-owned electric utilities, pursuant to such terms and conditions as PASNY deemed appropriate.

On January 31, 1984, PASNY rendered its Decision Adopting in Part and Modifying in Part Recommended Decision in its 1985 Neighboring State Hydroelectric Allocation Plan Proceeding, allocating to the New Jersey Board of Public Utilities, as the bargaining agent for the State of New Jersey, an allocation of low cost hydro-electric power from the Niagara and St. Lawrence projects, based upon the total number of New Jersey residential customers, whether served by a municipal utility, a rural electric cooperative association or an investor-owned utility.

The Rhode Island Public Utilities Commission as designated exclusive bargaining agent for the State of Rhode Island also intervened in PASNY's 1985 Neighboring State Hydroelectric Allocation proceeding, sponsoring a preference power application on behalf of all Rhode Island domestic consumers. Rhode Island's application was approved by the PASNY examiner and Trustees, and Rhode Island contracted for an allocation of 15 megawatts for the period 1985-1995.

However, before the allocations could be implemented, the Federal Energy Regulatory Commission ("FERC") issued its Opinions No. 229 and 229-A. *Declaratory Opinion and Order Affirming with Modifications Initial Deci-*

sion on Niagara Preference Power for States Neighboring New York, 30 FERC (CCH) ¶61,323 (March 27, 1985); *Opinion and Order on Rehearing Clarifying Declaratory Opinion in Part, and Granting Petitions to Intervene Out of Time,* 32 FERC (CCH) ¶61,194 (July 30, 1985).

In Opinion Nos. 229 and 229-A, the Commission, largely relying on its reading of an earlier decision of the Second Circuit Court of Appeals, *Power Authority of the State of New York v. FERC,* 743 F.2d 93 (1984), reversed its own previous decision in *State of Vermont Public Service Board v. Power Authority of the State of New York,* 55 FPC 1109 (March 12, 1976) (*"Vermont* PSB"), and Initial Decision rulings that the Vermont Department of Public Service ("Vermont DPS") qualified as an NRA public body. In Opinion No. 229, *supra,* the Commission explained that the Vermont DPS was not an NRA public body because it did not own a retail electric distribution system. In Opinion No. 229-A, *supra,* the Commission immediately withdrew the retail distribution system ownership requirement, but maintained that Vermont was not a public body because it was not serving retail load. (One Commissioner dissented to the two FERC opinions asserting that the Commission's public body rulings were contrary to the plainly stated provisions of the NRA.)

As a result of these FERC decisions below, the allocation to cross-petitioner States was dramatically reduced. Rhode Island's allocation, for instance, has been limited to the tiny Pascoag Fire District, serving 3000 persons, and New Jersey's non-investor-owned public utilities serve only 2% of the residential units of the State.

REASONS FOR GRANTING THE WRIT

There are at least five reasons for granting the cross-petition:

Petitioner MTA only raised in part the issue considered below, and the question MTA presents omits the important questions involving access by States on behalf of their citizens to Niagara hydropower.

The Second Circuit's affirmance of FERC's decision below was in error in failing to follow the plain meaning of the NRA.

The Second Circuit's reading of the legislative history is inconsistent with the bills actually being debated.

The Second Circuit's decision was in error in failing to respect the proper relationship between judicial and administrative decision making established by decisions of this Court.

This Court's guidance is required to rectify the confusion exhibited by both the FERC and the Second Circuit in their inconsistent decisions regarding this key issue of statutory construction.

I. THE COURT SHOULD GRANT THIS CROSS-PETITION IN ORDER TO OBTAIN A PRESENTATION OF THE STATE ACCESS ISSUE PRESENTED BY THE CONSTRUCTION OF THE NRA "PUBLIC BODIES" LANGUAGE.

Under Rule 19.5 of the Rules of this Court this cross-petition depends on the granting of Petitioner MTA's petition for a writ of certiorari. However, if that petition is granted, then this cross-petition must also be granted in

order for this Court to consider all of the relevant issues raised by the challenged construction of the term "public bodies" in the NRA. The question presented by petitioner MTA offers to this Court the issue of "a government agency which uses the hydropower itself, but does not resell the hydropower to other consumers of electricity". The issue of what a "public body" is within the meaning of the NRA is still broader.

The background of this case is that States have long been recognized as eligible recipients of Federal hydropower. The Boulder Canyon Project Act of 1928, 43 U.S.C. § 617(d)(c) specified that "states" were to be eligible recipients of Federal preference power. Indeed, under the Boulder Canyon Act, states were the only statutorily specified recipients of the Federal preference. (A-64). Chronologically, next was the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831(i), which expanded the classes of preference customers to include "counties, municipalities and cooperative organizations" as well as States.

The objective of establishing domestic and rural consumers as the chief preference power beneficiaries was first explicitly recognized in the Bonneville Project Act of 1937, 16 U.S.C. § 832c. The Bonneville Act also introduced the term "public bodies" and declared that the preference for "public bodies and cooperatives" was for the purpose of insuring that domestic and rural consumer benefits would be realized. In pertinent part, the statutory recital is:

> In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and

> particularly of domestic and rural consumers, the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives. [16 U.S.C. § 832c(a)].

Under the Bonneville Act, the term "public bodies" specifically includes States:

> As employed in this chapter, the term "public body", or "public bodies", means States, public power districts, counties, and municipalities, including agencies or subdivision of any thereof. [16 U.S.C. § 832(b) (1982)].

See also Aluminum Company of America v. Central Lincoln Peoples' Utility District, et al., 467 U.S. 380, 384 (1984) (preference customers under the Bonneville Act consist of "States, public power districts, counties and municipalities, including agencies or subdivisions of any thereof.") Thereafter, in the Flood Control Act of 1944, 58 Stat. 887, and in the NRA, Congress used the Bonneville Act's "public bodies" terminology without defining the term. As recognized by the Attorney General of the United States, the absence of the "public bodies" definition was not intended to change the entities who are eligible to purchase preference power. *Disposition of Surplus Power Generated at Clark Hill Reservoir Project,* 41 Op. A.G. 236, 249 (1955).

States have thus traditionally been regarded as recipients of the Federal preference. The NRA itself confirmed the important role of neighboring States with the statutory provision that States may designate bargaining agencies, in which case PASNY "shall deal only with such

agency in that State'' for the procurement of power on behalf of the state. 16 U.S.C. section 836(b)(2). Cross-petitioners Rhode Island and New Jersey as well as other states including Massachusetts and Vermont, have established designated state bargaining agencies for the purchase of PASNY power. The issue of whether these States, through their designated state bargaining agencies, are ''public bodies'' within the meaning of the NRA was addressed below both at the administrative and appellate levels.

In fact, the status of the Vermont Department of Public Service, Vermont's designated state bargaining agency, was the primary focus of controversy below. To review the definition of ''public bodies'' under the NRA only in light of the petition of the MTA would be to turn a blind eye to the State access issue that the definition of the term presents.

The neighboring States contemplated by the NRA have had their role reduced or eliminated by FERC's construction of the statute, to the detriment of thousands of state citizens who are domestic and rural consumers of electric power, and impairing the rights of the States as sovereigns to protect the interests of their citizens as consumers of electricity. The breadth and importance of the issue of State access to Niagara hydropower requires that it be reached as well, if this Court grants the MTA petition.

II. THE SECOND CIRCUIT'S AFFIRMANCE OF THE DECISION OF THE FEDERAL ENERGY REGULATORY COMMISSION WAS IN ERROR IN IGNORING THE PLAIN MEANING OF THE STATUTE, MISREADING THE LEGISLATIVE HISTORY, AND FAILING TO PRESERVE THE PROPER RELATIONSHIP BETWEEN ADMINISTRATIVE AND JUDICIAL DECISION MAKING.

A. The Second Circuit's Reading of the NRA Conflicts with the Plain Meaning of the Statute.

On its face, the NRA's language is clear, understandable, and unequivocal: preference power allocated from the Niagara project is to be made "available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available . . . in such manner as to encourage the *widest possible use.*" 16 U.S.C. § 836(b)(1) (emphasis added). In order to achieve this result, Congress further provided that PASNY is to "give preference and priority to public bodies and nonprofit cooperatives." *Id.*

Central to the Commission's administration of the NRA, then, is the definition it gives to the term "public bodies." In its own previous decision in *State of Vermont Public Service Board v. Power Authority of the State of New York*, 55 FPC 1109 (1976) (*Vermont PSB*), the Commission originally gave this term the encompassing definition that would logically follow from the ordinary meaning of "public bodies", as well as from the lack of any express statutory restriction on its meaning. Curiously, the FERC then performed a 180-degree turn-around on

that position in Opinions Nos. 229 and 229-A, substantially relying on an opinion of the Second Circuit Court of Appeals, *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (1984) (*"PASNY"*). In affirming the FERC's revised definition, the Second Circuit compared the definition to the obvious meaning of that phrase:

> Literally, the term "public bodies" is not limited to "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." However, the legislative history of the NRA demonstrates that this is what Congress intended the term to mean.

(A12).

This single paragraph embodies the error within the Second Circuit decision. This Court's long-standing instruction is that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). To the degree that any resort to legislative history is permitted in such instances, it is solely to determine if there is a clearly expressed legislative intent to the contrary. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980), *cited in United States v. James*, — U.S. —, 106 S. Ct. 3116, 3122 (1986) (*"James"*). Notably, in its earlier *PASNY* decision, *supra*, the Second Circuit adverted to the principle of deference to administrative expertise, but continued:

> Of even greater importance in this case is the maxim that "(a)bsent a clearly expressed legislative intention to the contrary, (statutory) language must ordinarily be regarded as conclusive."

PASNY, 743 F.2d at 103, quoting *Bread Political Action Committee v. FEC*, 455 U.S. 577, 580 (1982) (further citations omitted).

When legislative history falls short of such overriding contradiction, and when the language of a statute is clear, legislative history is not to be used as a tool of interpretation, but merely a means to corroborate the plain meaning of a statute. In *James, supra*, the Court explained:

> The starting point in statutory interpretation is "the language of the statute itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 . . . (1975) (Powell, J., concurring). "[W]e assume that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

James, 106 S.Ct. at 3121. In determining that the meaning of the quoted statute was plain, the Court acknowledged: "It is difficult to imagine broader language." *Id.*[2] This determination then led the Court to refer to the legislative history only to reinforce its understanding of what the plain meaning of the statute was. *Id.* at 3122. Given the NRA's equally plain and broad language, the Second Circuit should have followed the lead of this Court in *James*.

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[2]At issue in *James* was the immunity provision of Section 702c of the Flood Control Act of 1982, 33 U.S.C. § 702c (1982): "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." The Court noted that "given the plain terms of the statute, 'it requires some ingenuity to create ambiguity.' *Rothschild v. United States*, 179 U.S. 463, 465 (1900)." *Id.*

The Second Circuit would have been far better served in its decision below by eschewing its resort to legislative history, and instead following the doctrine that the various provisions of the NRA quoted above should be read together. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975). The clear intent of Congress embodied in the NRA is that "public bodies" and "nonprofit cooperatives" are to be given preference in order to ensure that the sale and distribution of Niagara preference power is "primarily" for the benefit of domestic and rural consumers, *and* to encourage the "widest possible use." 16 U.S.C. § 836(b)(2). There is no restriction apparent on the face of the statute on the type of agency that may be considered a "public body", as long as the goal of receipt primarily for the benefit of domestic and rural consumers over the widest possible use is achieved. Indeed, the narrow reading is contrary to the inclusion of *both* "public bodies" and "nonprofit cooperatives" as statutory recipients. Obviously, Congress intended the term "public bodies" to mean something in addition to, and separate from, "nonprofit cooperatives." Yet the restrictive definition of "public bodies" to mean only "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail" would qualify few types of entities other than nonprofit cooperatives. Additionally, as we have explained in Section I, *supra*, the NRA specifically establishes a role for state bargaining agencies, providing:

> That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee (PASNY) shall deal only with such agency in that State.

16 U.S.C. § 836(b)(2). This role is rendered meaningless by the decisions below.

The "widest possible use" measure, *supra*, provides a compelling example of the Second Circuit's distortion of the NRA's plain meaning and intent. The cross-petitioners, as designated State bargaining agencies, are in a unique position to purchase Niagara preference power on behalf of *all* the domestic and rural consumers in their respective States. The States can assure that no additional charges are added to the price ultimately paid for the power by these consumers, that investor-owned utilities obtain no profit from the transaction, and that consumers receive the power at "the lowest rates reasonably possible." 16 U.S.C. § 836(b)(1). The cross-petitioners may use the facilities of local utilities to distribute the power, without relinquishing control over the power's distribution, and as regulators of retail rates determine the price at which Niagara preference power is sold. Even under so-called "yardstick competition" theory, no process will make regulators more cognizant of the opportunities of low-cost electric power than to be the actual implementers and conduits of that power.

The allocation of Niagara preference power to cross-petitioners, more than to any other type of "public body", will fulfill the goals of the Act to distribute Niagara power to domestic and rural consumers as widely as possible, at the lowest possible rates, and without profit. The Second Circuit's interpretation of the NRA deprives thousands of consumers within neighboring States of the benefits of the low cost Niagara power contrary to the clearly expressed legislative intent to encourage the "widest possible use"

of the power. No agency or court should narrow a definition that Congress meant to be so broad, and described so plainly.

B. The Second Circuit misinterpreted the legislative history of the NRA.

In *PASNY v. FERC*, the Second Circuit wisely cautioned prudence in the use of legislative history to interpret the NRA noting that the "agonizingly long legislative history of the NRA . . . contains many statements, which when taken out of context, appear to support varied interpretations of the statute". 743 F.2d at 105. However, in the case below, the Second Circuit abandoned its own wise counsel and plunged into the thicket of legislative history without reference to the context of the 1957 debates.

While the legislative history of the NRA was "agonizingly long", by 1957 when the NRA was passed, the numerous differences in the Congress were narrowed down to two Senate Bills; S.512, the so-called Clark Bill which was favored by proponents of a strong municipal preference and S.1037, the so-called Ives bill which was favored by the New York Congressional delegation and which contained a weaker municipal preference clause.[3] These two bills provide the context necessary to interpret the 1957 legislative history. The critical error in the Second Circuit's opinion, which led to its ultimate finding that States are not eligible public body purchasers of preference pow-

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[3]Hearings before a Sub-Committee of the Committee on Public Works, United States Senate, 85th Cong. First Sess., on S.512 and S.1037 (April 10, 11, 12, 13, 1957), pp. 1, 2, 4 (RINJA 1-10).

er, was its mistaken notion that S.512 "never offered a preference to non-defense related government bodies which did not distribute the power to consumers" (A-15).

The S.512 preference provision states in pertinent part:

> In contracting for the disposition of project power, the licensee (the New York Power Authority) shall (A) give equal preference for the purchase of such power to (i) counties and municipalities, including their agencies or instrumentalities, (ii) departments, agencies, and instrumentalities of New York State, (iii) rural electric cooperatives not organized or administered for profit but primarily for the purpose of supplying electric energy to their members as nearly as possible at cost; and (iv) the defense agencies of the United States, and (B) make flexible arrangements and contracts for the disposition of project power to utility companies organized and administered for profit, with suitable provisions in such contracts for the withdrawal upon reasonable notice and fair terms of enough power to meet the needs of the foregoing classes of preference customers.
>
> * * *
>
> The licensee shall make a reasonable portion of the project power available for use within economic transmission distance in neighboring States and shall cooperate with the appropriate agencies in such States to insure compliance with this requirement.
>
> * * *
>
> Project Power shall be sold and distributed primarily for the benefit of the people as consumers, and particularly for the benefit of domestic and rural consumers, to whom it shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use. (RINJA 2-4).

By contrast, Senate Bill 1037 provided that the Federal Power Commission license issued to the Power Authority for construction of the Niagara Project was to include:

> (d) a provision giving defense agencies of the United States a preference to purchase power;
>
> (e) a provision requiring a reasonable amount of power to be made available within the project's economic market area in neighboring States to be distributed according to their laws;
>
> (f) a provision requiring that a reasonable amount of the power available in the State of New York and of the power made available in neighboring States under paragraph (e) be allocated for the present and reasonably foreseeable future needs of rural electric cooperatives and municipalities in the project's economic market area.

(RINJA 8).

A reading of the two bills makes two points with compelling clarity. First, S.512 was far more specific than S.1037 in establishing that a specific portion of the project power would be available to and reserved for municipal electric utilities and cooperatives. Second, contrary to the Court's conclusion, S.512 *did* offer "a preference to non-defense related government bodies which did not distribute power to consumers" (A-15). S.512 included as preference customers counties and municipalities, including their agencies and instrumentalities, and departments, agencies, and instrumentalities of New York State, none of whom was necessarily a distributor of power to consumers.

Senate Bill S.512 contains a stronger municipal preference clause than S.1037, yet nothing in S.512 or in the legislative history supports a judgment that the Congress

believed that the S.512 preference would restrict power sales to governmental entities owning electric distribution systems.[4] The legislation contained in H.R. 862 which actually became the NRA[5] was a compromise among the various factions in Congress including those on both sides of the municipal preference issue. That compromise was intended to narrow rather than exacerbate the differences in Congress. There was no intent in Congress to insert in the NRA a stronger municipal preference provision than included in the Clark bill.

As to preference, the NRA compromise took these essential forms: first, the scope of the preference was confined to 50% of the power to be sold from the project; second, the preference for cooperatively owned electric systems was retained; and third, the term "public bodies" which had been historically used in Federal hydropower statutes to denote a large class of recipients—not merely governmental electric systems—was substituted for the

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[4]In interpreting S.512 as containing an exclusive municipal preference the Court was led to conclude that Senator Kerr and Representative Dooley of the New York Congressional delegation did not understand the NRA legislation (A-15). In fact, Senator Kerr, the Senate majority leader, was responsible for shepherding the NRA through the legislative process and he actually authored the compromise measure which became the NRA (A-36). Congressman Dooley was an active member of the New York Congressional delegation which the FERC recognized as having a veto power over any NRA legislation which was not to its liking (A-31, A-32, fin. 9). In short, the Court's facially-wrong interpretation of S.512 and the entire package of NRA legislative history cannot be reconciled with the views of Congressmen who were on the scene, who were familiar with the contents of the proposed legislation and who were instrumental in the NRA's enactment.

[5]H.R. Rep. No. 862 8th Cong. 1st Sess. (1957), Reprinted in 1957 U.S. Code & Cong. Ad. News 1585.

classes of preference customers enumerated in S.512 and S.1037. The NRA legislative history seen in context thus provides no basis for the Second Circuit's judgment that the term "public bodies" was intended to be restricted to public bodies owning municipal electric distribution systems.

States have traditionally been regarded as recipients of the federal preference (Section I, *supra*), and there was no intent in the NRA to exclude States from the Federal preference power requirements. The Court should issue its writ of certiorari to correct the consequent abridgement of the cross-petitioner States' rights.

C. The Second Circuit's Decision Transgresses upon the Proper Relationship between Judicial and Administrative Decision Making.

FERC Opinion No. 229 and the Second Circuit decision affirming it are also defective in that the FERC decision is not based on the FERC's own, independent interpretation of the NRA, but relies on a decision of the Second Circuit in an earlier case, *Power Authority of the State of New York v. FERC*, 743 F.2d 93 (2nd Cir. 1984) ("*PASNY*"). By subordinating its own judgment to the Second Circuit's *PASNY* decision, the FERC abdicated its decisional responsibility and ignored this Court rulings in *Chevron U.S.A. Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837 (1984) and *Chemical Manufacturers Ass'n. v. NRDC*, 470 U.S. 116, 84 L. Ed. 2d 90 (1985). Opinion No. 229 as affirmed by the Second Circuit is also in conflict with the opinion of the District of Columbia Circuit Court of Appeals in *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165 (D.C. Cir. 1986), which applied the *Chevron/*

Chemical Manufacturers rule in circumstances exactly paralleling the circumstances of the Second Circuit decision below.

The NRA provides that Niagara power is to be distributed at the lowest possible cost on as wide a basis as possible primarily to "domestic and rural consumers". 16 U.S.C. § 836(b)(1). The NRA preference for domestic and rural consumers is called "an end-use preference" in Opinion No. 229 (A-63). This end-use preference determination was critical to the Commission's former interpretation that states as "public bodies" had the authority to purchase Niagara preference power and to resell that power to their domestic and rural consumers without regard to whether those consumers received the balance of their electricity from private utility companies or municipally or cooperatively owned electric distribution systems. In Opinion No. 229, the FERC rejected its earlier ruling in *Vermont PSB* and the ruling by the Administrative Law Judge precisely because those rulings were predicated on the statute's "end-use" preference for domestic and rural consumers (A-63). The commission asserted:

> The critical error in the Initial Decision in this case and the *Vermont* [*PSB*] decision upon which the judge relied, is the assumption that the NRA contains an end-use preference. In defining VDPS [a state agency] as a public body, the judge put great weight upon the fact that VDPS was using the preference power to benefit domestic and rural consumers. Initial Decision at page 1. *Yet the Second Circuit* [*in PASNY*] *has now ruled that the NRA contains no end-use preference.* (A. 63, emphasis added).

Opinion No. 229's reversal of the *Vermont PSB* decision over this "critical error", *id.*, was the undistilled result of FERC subordination to its perception of the Second Circuit decision in *PASNY*. Instead of independently evaluating the NRA public body provision in light of the statutory domestic and rural consumer preference, the FERC treated that preference as a nullity in "obedience" to the Second Circuit's *PASNY* decision (A-63). The FERC "reasoning" was that "PASNY has instructed us not to scrutinize end-use" (A-63); that *PASNY* establishes that "the NRA contains no end-use preference" (A-63); and that *PASNY* had "rejected an end-use preference" (A-64). The FERC even rested its ultimate finding that states were not NRA public bodies on the use in the *PASNY* decision of "the term 'municipal utilities' for public bodies" (A-65). The Opinion 229 thus was shaped in a decisive, dispositive and impermissible manner by the FERC's subservience to the *PASNY* decision of the Second Circuit and not FERC's experience and expertise.[6]

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[6]Although in Opinion 229-A the FERC asserted that it had "not read the Second Circuit's decision to be determinative" (A-28), it admitted that it believed it was compelled "to depart from [its own] interpretation of 'public body' and to seek guidance from the legislative history in determining congressional intent", *id.*, by its view that the Second Circuit had determined in *PASNY* that the NRA does not contain an end-use preference. This belief was "critical" to its decision (A-63). In fact, despite its disclaimer, the FERC's lack of independent judgment is evident throughout its analysis. Thus, the FERC in Opinion 229-A explained, "any other interpretation of 'public bodies' would lead to absurd results and would thwart the purposes of the NRA, as those purposes have been defined by the Second Circuit in *PASNY*." (A-30).

Opinion No. 229 and the Second Circuit decision both violate this Court's rulings in *Chevron* and *Chemical Manufacturers Ass'n., supra.* In *Chevron,* this Court held that Where the statutory intent of Congress requires judicial or administrative interpretation, that interpretation must be supplied at least in the first instance by the regulatory agency. Once the agency has furnished its interpretation, it becomes the responsibility of the reviewing court to determine if the agency's interpretation "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" (467 U.S. at 845). In *Chemical Manufacturers,* the Court stated:

> This view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very "complex statute" is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA. [470 U.S. at 125, 84 L.Ed. 2d at 98].

Here the FERC and the Second Circuit have stood the *Chevron/Chemical Manufacturers* doctrine on its head. Instead of deference by the court to the agency, the court and the agency offer deference by the agency to the court. Thus, the court improperly preempts and the agency improperly eschews the pivotal role reserved for the agency in statutory interpretation.

In *Phillips Petroleum, supra,* the District of Columbia Circuit, like the Second Circuit below, was confronted with an agency which had subordinated its decisional responsibilities to its perception of the requirements of a court decision. The *Phillips* Court observed that in the case before it the FERC had viewed itself as having no independ-

ent choice, that it regarded itself as "bound", 792 F.2d at 1170, and "required", *id., quoting* FERC Order No. 391, Fed.Reg. at 33,852, to follow its perception of an interpretation of this Court in *Public Service Comm'n of New York v. Mid Louisiana Gas Company,* 463 U.S. 319 (1983). However, unlike the Second Circuit, the District of Columbia Circuit adhered to the *Chevron* and *Chemical Manufacturers* decisions, and remanded the case to the agency for a decision in keeping with the agency's statutory responsibilities. The District of Columbia Circuit justified its action with reference to this Court's holding in *SEC v. Chenery,* 318 U.S. 80 (1943):

> If the [agency] action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the court does come into play, an agency order may not stand if the agency has misconceived the law. [*Chenery,* 318 U.S. at 94, as quoted in *Phillips,* 792 F.2d at 1170].

The *Phillips* Court concluded:

> We express no opinion about the "correct" interpretation of the [statute]. We have discussed the competing interpretations . . . merely to illustrate the complex task forsaken by FERC when it incorrectly concluded that it was bound by *Mid-Louisiana.* On remand, FERC may construe [the statute] so as to justify parity in rates, or it may otherwise interpret [the statute]; but FERC *may not* assume any particular construction is mandated by *Mid-Louisiana* (792 F.2d at 1172).

The failure of the FERC in this case to fulfill its indispensable role in the administrative process should have triggered the Second Circuit to remand the case to the FERC to require that agency to exercise its judgment. Given the FERC's deference to the Second Circuit and abandonment of its independent analysis of the statute, in light of *Chevron, Chemical Manufacturers* and *Chenery* the Second Circuit's failure to take that action was in error and warrants the issuance of the writ of certiorari which cross-petitioners have requested.

III. THIS COURT'S GUIDANCE IS REQUIRED TO RECTIFY THE EXTREME CONFUSION DISPLAYED BY BOTH THE COMMISSION AND THE COURT ON A KEY QUESTION OF STATUTORY CONSTRUCTION

The Second Circuit's decision affirming the FERC's overly restrictive definition of "public body" has done nothing to clarify what is an area of increasing confusion: precisely which governmental entities qualify as "public bodies" to receive Niagara preference power. This Court's exercise of its discretion to grant a writ of certiorari is justified where, as here, a federal court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Sup. Ct. R. 17.1 (c).

The confusion and uncertainty that currently exist on this point are manifested in several ways. First, and most significant, is the abrupt about-face in the FERC rulings below. The determination that the Department of Public Service of the State of Vermont is not a public body within the scope of the NRA and therefore is not entitled to

purchase Niagara preference power on behalf of its domestic and rural consumers inexplicably overrules the Commission's own prior judgment to the contrary in *State of Vermont Public Service Board v. Power Authority of the State of New York*, 55 FPC 1109 (1976) (*"Vermont PSB"*). There the Commission found that the same state agency[7], subject to the same statute and operating under the same conditions, did qualify as a public body under the NRA.

The Commission of course has a right to interpret anew a statute it is charged with administrating—but only if there is a rational basis for the shift in policy. *See Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41-44 (1983); *see also, Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. den.*, 403 U.S. 923 (1971). Where there has been an unjustified departure from a prior decision, less deference to the agency is due.[8]

> A consistent interpretation of a statute by a body created to administer it is indeed entitled to judicial respect. But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body.

FPC v. Jantzen, Inc., 356 F.2d 253, 257 n.4 (9th Cir. 1966), *rev'd on other grounds*, 386 U.S. 228 (1967) (*"Jantzen"*).

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[7]The Vermont Department of Public Service was previously the Vermont Public Service Board.

[8]As discussed above, to the degree that FERC seeks to rationalize this change as one based not on its own judgment as to the appropriate reading of the Act, but instead as a response to an instruction from the Second Circuit, the change likewise cannot stand. *See* Section II C, above.

In *Jantzen*, the Ninth Circuit explained further that the deference that is due is to the interpretation that is closer in time to enactment of the statute at issue. *Jantzen*, 356 F.2d at 257 n.4. Manifestly, in this case, that is the 1976 *Vermont PSB* decision.

The confusion is continued in the subsequent "flip-flop" the Commission performed between March and July of 1985 in Opinions Nos. 229 and 229-A. In Opinion No. 229, the Commission stated that a NRA "public body" must own a retail electric distribution system. In Opinion No. 229-A, it immediately changed the requirement to having responsibility for a retail electric load.

The confusion at the administrative level is paralleled now at the federal appellate level. The Second Circuit's affirmance of Opinion No. 229-A is at variance with that circuit's prior counsel in *PASNY*:

> If Congress had wanted to restrict resale to domestic and rural consumers it could easily have done so simply by stating that the power was to be made available to public bodies "for resale only" to such consumers.

PASNY, 743 F.2d at 104. Similarly, if Congress had wanted to restrict the term "public bodies" to entities with retail distribution systems or with retail load responsibilities, "it could easily have done so simply by stating that the power was to be made available [only] to public bodies" possessing those precise criteria. *Id.* The Second Circuit's affirmation of the Commission's more recent

opinion creates a conflict within that circuit: *PASNY*'s approach to Congress' intent expressed in the NRA regarding the allocation of Niagara preference power cannot be squared with the same circuit's opinion below.

The inconsistency between FERC's decision in *Vermont PSB* and Opinion No. 229 exacerbated by the further inconsistency between Opinions Nos. 229 and 229-A, is supplemented by the inconsistency within the Second Circuit. Under these circumstances, and given the importance of the issue to thousands of State consumers, this confusion calls for this Court's definitive guidance. Cross-petitioners respectfully assert that this Court should exercise its discretion and grant the petition for a writ of certiorari.

CONCLUSION

Because petitioner MTA does not present this Court the State access issue presented below by the challenged statutory construction, because of the Second Circuit's failure to abide by the plain meaning of the NRA, to correctly read the legislative history of the NRA, and to correct FERC's abdication of its administrative responsibilities, and because of the confusion exhibited by both forums, cross-petitioners Rhode Island Public Utilities Commission and New Jersey Board of Public Utilities respectfully

request their cross-petition for a writ of certiorari be granted.

DATED: December 5, 1986

Respectfully submitted,

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APPENDIX

DEVELOPMENT OF POWER AT NIAGARA FALLS, N. Y.

WEDNESDAY, APRIL 10, 1957

UNITED STATES SENATE.
COMMITTEE ON PUBLIC WORKS,
SUBCOMMITTEE ON FLOOD CONTROL—
RIVERS AND HARBORS,

Washington, D. C.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 412, Senate Office Building, Hon. Robert S. Kerr, presiding.

Present: Senators Kerr (chairman of the subcommittee), Gore, Neuberger, Scott, Carroll, Case, Kuchel, Cotton, and Hruska.

Also present: Senators Clark (Pennsylvania), Ives (New York), Javits (New York), and Congressman Miller (New York).

Senator Kerr. The committee will be in order.

We have before us S. 512 and S. 1037, bills to authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

(S. 512 and S. 1037 follow:)

[S. 512, 85th Cong., 1st sess.]

A BILL To authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress as-

sembled. That pursuant to the provisions of the reservation of the Senate of the United States in giving its advice and consent to the ratification of the treaty between the United States of America and Canada concerning uses of the waters of the Niagara River signed February 27, 1950, which provides that no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress, a project for the redevelopment of the United States share of such waters for power purposes is hereby authorized, in accordance with existing general laws of the United States and this Act. This authorization constitutes compliance with the reservation to said treaty and is consistent therewith.

Sec. 2. (a) The Federal Power Commission is hereby authorized and directed to issue a license to the New York Power Authority for the construction and operation of the project, upon its application therefor and its acceptance of licensing conditions set forth in this section.

(b) The Federal Power Commission shall include among the licensing conditions, in addition to those deemed necessary and required under the terms of the Federal Power Act, the following:

(1) In contracting for the disposition of project power, the licensee (the New York Power Authority) shall (A) give equal preference for the purchase of such power to (i) counties and municipalities, including their agencies or instrumentalities, (ii) departments, agencies, and instrumentalities of New York State, (iii) rural electric cooperatives not organized or administered for profit but primarily for the purpose of supplying electric energy to

their members as nearly as possible at cost; and (iv) the defense agencies of the United States, and (B) make flexible arrangements and contracts for the disposition of project power to utility companies organized and administered for profit, with suitable provisions in such contracts for the withdrawal upon reasonable notice and fair terms of enough power to meet the needs of the foregoing classes of preference customers.

(2) The licensee shall, if available on reasonable terms and conditions, acquire by purchase or other agreement, the ownership or use of, or if unable to do so, construct such transmission lines as may be necessary to make the power and energy generated at the project available in wholesale quantities for sale on fair and reasonable terms and conditions to privately owned companies, to the preference customers enumerated in subparagraph (1) (A) of this subsection, and to the neighboring States in accordance with paragraph (3) of this subsection.

(3) The licensee shall make a reasonable portion of the project power available for use within economic transmission distance in neighboring States and shall cooperate with the appropriate agencies in such States to insure compliance with this requirement. In the event of disagreement between the licensee and the power-marketing agencies of any of such States, the Federal Power Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: *Provided*, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. With respect to the share of the power so allocated, the arrangements

made by the licensee for the sale of power to or in such States shall include observance of the preferences numbered (i) and (iii) in subparagraph (1)(A) of this subsection.

(4) Project power shall be sold and distributed primarily for the benefit of the people as consumers, and particularly for the benefit of domestic and rural consumers, to whom it shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use.

(5) In the event project power is sold to any purchaser for resale, contracts for such sale shall include adequate provisions for establishing resale rates, to be approved by the licensee, consistent with paragraph (4) of this subsection.

(6) The licensee, in cooperation with the appropriate agency of the State of New York which is concerned with the development of parks in such State, shall construct a scenic drive and park of the American side of the Niagara River, near the Niagara Falls, pursuant to a plan, the general outlines of which shall be approved by the Federal Power Commission; and the cost of such drive and park shall be considered a part of the cost of the power project and part of the licensee's net investment in said project: *Provided,* That the maximum part of the cost of such drive and park to be borne by the power project and to be considered a part of the licensee's net investment shall be $15,000,000.

(7) The licensee shall pay to the United States and include in its net investment in the project herein authorized the United States share of the cost of the construc-

tion of the remedial work, including engineering and economic investigations, undertaken in accordance with article II of the treaty referred to in the first section of this Act whenever such remedial works are constructed by the United States.

Sec. 3. The license issued under the terms of this Act shall be granted in conformance with Rules of Practice and Procedure of the Federal Power Commission, but in the event of any conflict, the provisions of this Act shall govern in respect of the project herein authorized.

Sec. 4. This Act may be cited as the "Niagara Redevelopment Act of 1957".

[S. 1037, 85th Cong., 1st sess.]

A BILL To authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

CONGRESSIONAL FINDINGS

SECTION 1. The Congress hereby finds and declares—

(a) that an emergency exists in the western part of the State of New York as a result of a rock slide which on June 7, 1956, destroyed most of the facilities employed by the licensee of Federal Power Commission project 16 for the generation of power by the use of waters of the Niagara River;

(b) that the power generated at such facilities was largely used by electrochemical and electromet-

allurgical industries vital to the defense of the United States and employing a large portion of all workers resident in the vicinity;

(c) that these industries would be forced to curtail their operations drastically or abandon them at a cost of tens of thousands of jobs were it not that they are able to receive necessary power at high cost on a temporary basis from the generating facilities of the Hydro-Electric Power Commission of Ontario which is using not only Canada's share of the water permitted under the treaty signed on February 27, 1950, between the United States and Canada, but also a large part of the United States share of such water;

(d) that the licensee of project 16 is entitled to use nineteen thousand seven hundred and twenty-five cubic feet per second of the United States share of the waters until 1971 and to use a further twelve thousand seven hundred and seventy-five cubic feet per second until further order of the Commission;

(e) that by the use of this total of thirty-two thousand five hundred cubic feet of water per second, the licensee of project 16 annually produced approximately four billion kilowatt-hours of energy;

(f) that a modern hydroelectric plant proposed to be constructed by the Power Authority of the State of New York to take advantage of the entire drop of the Niagara River can produce about the same amount of power by the use of nineteen thousand seven hundred and twenty-five cubic feet of such water per second;

(g) that by the use of this water and of the additional water permitted to be used under the 1950 treaty, approximately thirteen billion kilowatt-hours annually of urgently needed power can be produced by the project; and

(h) that it is, therefore, imperative that the works to produce such power be constructed without further delay.

ISSUANCE OF LICENSE

SEC. 2. The Federal Power Commission is hereby expressly authorized and directed to issue a license pursuant to the Federal Power Act to the Power Authority of the State of New York for a power project with capacity to utilize all of the United States share of the waters of the Niagara River permitted by international agreement.

CONDITIONS OF LICENSE

SEC. 3. The Federal Power Commission shall include among the conditions of the license issued under section 2—

(a) a provision requiring the licensee to reimburse the United States for its share of the cost of construction of remedial works, including engineering and economic investigations, undertaken in accordance with article II of the 1950 treaty;

(b) a provision requiring the licensee, as a part of the cost of the project and in cooperation with the agency of the State of New York in charge of the development of parks, to protect the scenic values of the American side of the gorge in a manner similar to that in which they have been safe-guarded on the Canadian side and to construct a scenic drive and park on the American side of the Niagara River near Niagara Falls pursuant to a plan, the general outlines of which shall be approved by the Federal Power Commission;

(c) a provision requiring the licensee to contract, with the approval of the Governor of the State of New York, pursuant to the procedure established by New York law, to sell to the licensee of project 16 for a period ending on the final maturity date of the bonds initially issued to finance the project works herein, specifically authorized, four hundred and forty-five

thousand kilowatts of power, which is equivalent to the amount produced by project 16 prior to June 7, 1956, for the same general purposes for which power from project 16 was utilized and in order to restore as nearly as possible low power costs: *Provided,* That the licensee of project 16 consents to the surrender of its license at the completion of the construction of such project works upon terms agreed to by both licensees and approved by the Federal Power Commission which shall include the following: (i) the licensee of project 16 shall waive and release any claim for compensation or damages from the Power Authority of the State of New York or the State of New York except just compensation for tangible property and rights-of-way actually taken, (ii) without limiting the generality of the foregoing, the licensee of project 16 shall waive all claims to compensation or damages based upon loss of or damage to riparian rights, diversionary rights or other rights relating to the diversion of the use of water, whether founded on legislative grant or otherwise;

(d) a provision giving defense agencies of the United States a preference to purchase power;

(e) a provision requiring a reasonable amount of power to be made available within the project's economic market area in neighboring States to be distributed according to their laws;

(f) a provision requiring that a reasonable amount of the power available in the State of New York and of the power made available in neighboring States under paragraph (e) be allocated for the present and reasonably foreseeable future needs of rural electric cooperatives and municipalities in the project's economic market area.

SHORT TITLE

Sec. 4. This Act may be cited as the "Niagara Development Act of 1957."

Senator Kerr. There will be incorporated in the record at this point letters pertaining to this hearing from the following: Mr. Robert E. Merriam, Assistant Director, Bureau of the Budget; Mr. Robert C. Hill, Assistant Secretary, Department of State; Mr. Wilber M. Brucker, Secretary of the Army; and the reports of the Federal Power Commission.

(The letters referred to follow:)

Executive Office of the President,
Bureau of the Budget.

March 4, 1957.

Hon. Dennis Chavez.

Chairman Committee on Public Works,
United States Senate.

My Dear Mr. Chairman: This is in reply to your letters of January 15 and February 5, 1957, requesting the views of the Bureau of the Budget on S. 512 and S. 1037, to authorize the construction of certain works of improvement in the Niagara River for power and other purposes.

Although these bills differ in certain respects, they both would authorize the Federal Power Commission to issue a license to the New York Power Authority for the redevelopment of the United States share of the waters of the Niagara River. In accordance with the President's recommendation in his recent budget message, we strongly support prompt enactment of legislation which will make it possible to fully develop the hydroelectric power potential of this river.

In view of the need for congressional action to permit redevelopment to go forward and the emergency created by the destruction of part of the generating capacity at Niagara, the Bureau believes that the enactment of S. 1037 would be in the best interests of all concerned, and recommends favorable action on it by the committee. In making this recommendation, we assume that power distribution (other than that specified in the bill) will be made in accordance with New York law.

Sincerely yours,

Robert E. Merriam, *Assistant Director.*

Department of State.
Washington, March 6, 1957.

Hon. Dennis Chavez.

Chairman, Committee on Public Works,
United States Senate.

Dear Senator Chavez: Reference is made to your letter of January 15, 1957, and the reply of this Department dated January 16, 1957, concerning your desire to receive comment on S. 512, a bill to authorize the construction of certain works of improvement in the Niagara River for power and other purposes.